IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal No.
	)	B204093
Plaintiff and Respondent,	)	
	)	
v.	)	Superior Court No.
	)	BA316997
MAURICE LEWIS,	)	
	)	
Defendant and Appellant.	)	
	)	

FROM THE JUDGMENT OF THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, THE HONORABLE NORM SHAPIRO, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As is customary, this reply brief is confined to recent developments and matters addressed in respondent's brief, on which appellant believes further discussion would be helpful to this Court. The absence of a point from this reply brief means only that it falls into neither of those categories. No point made in the opening brief is withdrawn or abandoned unless it is done so explicitly.

ARGUMENT I

APPELLANT SHOULD HAVE BEEN PERMITTED TO RELIEVE RETAINED COUNSEL

A. The Wrong Standard Was Applied

Respondent contends that that trial court applied the correct legal principles in denying appellant's request to discharge his private attorney. (RB 11.) Respondent posits that the court may have intentionally referred to appellant's motion as a "*Marsden* motion", because it did not want to "confuse appellant." (RB 11.) The record belies respondent's theory as the court concluded the *ex parte* hearing regarding appellant's desire to fire his attorney with the conclusion that, "The court finds the record fails to demonstrate that continued representation by Mr. Ross would deprive the defendant of representation, and the *Marsden* motion is denied." (1 R.T. 96-97.) The prosecutor had stepped out of the courtroom when the matter was being heard. (1 R.T. 93.)

Appellant acknowledges that appellant's case is similar in procedural posture to that of the defendant in *People v. Hernandez* (2006) 139 Cal.App.4th 101, as observed by the respondent. (RB 10.) In *Hernandez*, as here, the court conducted a *Marsden* hearing rather than a hearing based on the factors from *People v. Ortiz*, (1990) 51 Cal.3d 975, 983, holding that the trial court may deny a request to discharge retained counsel "if discharge will result in 'significant

prejudice' to the defendant, or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.'" (*Id.* at p. 983.)

In *Hernandez*, when the defendant requested to discharge his counsel, almost immediately before jury selection in a two defendant case, the court was willing to concede that the trial court may have been correct in denying the defendant's motion based on timeliness, *had it made such a finding*. (*People v. Hernandez* (2006) 139 Cal.App.4th at 109, emphasis in the original.) In *Hernandez*, the court found there was nothing in the record to suggest any such inquiry was made. Observing the importance of the trial court's application of the correct inquiry, the court found that the trial court made no inquiry specific with respect to the time delay and did not refer to the time delaying its decision to deny appellant's request. The court noted that the court's "decision appears to have been based entirely on application of a *Marsden* analysis. As we also have discussed, that does not suffice in a case such as this, when the defendant is represented by retained counsel and is or may be eligible to have appointed counsel." (*Id.* at p. 109.) The court found the trial court did not adequately address the issue of delay and reversal was automatic for depravation of defendant's right to counsel of his choice. (*Ibid.*, citing *People v. Ortiz, supra*, 51 Cal.3d at p. 988.)

A non-indigent criminal defendant's Sixth Amendment rights encompass

the right to be represented by the attorney selected by the defendant. (*Wheat v. United States* (1998) 486 U.S. 153, 159 [108 S. Ct. 1692, 100 L. Ed. 2d 140]; *Powell v. Alabama,* (1932) 287 U.S. 45, 53 [53 S. Ct. 55, 77 L. Ed. 158].) As the United States Supreme Court stated in *Reynolds v. Cochran*, (1961) 365 U.S. 525, 531 [81 S. Ct. 723, 5 L.Ed. 2d 754], "In *Chandler v. Fretag* we made it emphatically clear, that there is an unqualified right to be heard through one's own counsel if in any case civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense." More recently, in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 147 [126 S.Ct. 2557, 165 L.Ed. 2d 409], the Supreme Court reiterated the right to counsel of choice has "been regarded as the root meaning of the constitutional guarantee" of the Sixth Amendment. Thus, where the "right to be assisted by counsel of one's choice is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." (*Id.* at p. 147.) Rather, the error is "structural" and requires reversal per se. *(Id.* at p. 148.)

Just as in *Hernandez*, here the court did not inquire as to possible delay or issues arising from any "significant prejudice" possibly resulting in a "disruption of the orderly processes of justice." Here, respondent notes several passing

comments made by the court that, on July 24, 2007, "it was a little late" to request a *Marsden* hearing, and that to allow appellant to change his attorney would enable him to "hire lawyer after lawyer, and on the eve of trial or just the beginning of trial, fire your lawyer, and then we'd never get the case tried." (1 R.T. 87-91, RB 7-8.)

Once the prosecutor left the room and the *Marsden*[1] hearing commenced however, there was no inquiry as to whether or not appellant had a lawyer ready to take over the case, how much time appellant needed to prepare for a new trial, or findings as to how the court could allow a continuance given the fact that the jury selection had started. Appellant was never asked whether he wanted to proceed *pro per*. (1 R.T. 94-97.) There were no findings made as to witness availability or scheduling restrictions. The fact that appellant had never previously asked for a continuance was not mentioned by the court. (1 R.T. 94-97.) The trial court did not even ask appellant any questions, nor give him a chance to explain his reasons to want to replace his attorney on the eve of trial. (1 R.T. 94-97.)

Despite respondent's claims, the record does not demonstrate the court's weighing of appellant's fundamental right to discharge his retained attorney against the disruption which might flow from the substitution. Clearly the court stated its disinclination to allow changes which would further delay appellant's

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[1]Referred to in the sealed transcripts as the "*Marsden* Hearing." (1 R.T. 94-97.)

trial schedule, however, the record reflects no meaningful inquiry into whether or not appellant's request was plausible. In the hearing, there is no reference to scheduling concerns, as the only focus is the court's determination as to whether or not trial counsel was depriving appellant of effective representation. (1 R.T. 96-97.) A pro forma *Marsden* inquiry, when a *Marsden* hearing was not even the appropriate vehicle for deciding whether appellant could discharge his retained counsel and where appellant did not even speak, does not fulfill the requirements of the inquiry required by *People v. Ortiz*, noting that "the court must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defense with counsel an empty formality.'" *(People v. Ortiz, supra*, 51 Cal.3d. at p. 984.)

Because the trial court utilized the wrong standard, it did not adequately address the issue of delay. Reversal is automatic where, as here, a defendant has been deprived of his right to defend with counsel of his choice. (*People v. Ortiz*, supra, 51 Cal.3d at p. 988.)

B. Appellant Was Not Improperly Attempting To Delay His Trial

Respondent concludes that appellant's request to discharge is attorney was for the purposed of delaying his trial. (RB 16.) The record does not demonstrate any attempts on the part of appellant to manipulate the court's scheduling process or the administration of justice.

Respondent asserts that appellant's request to discharge his attorney was only for the purpose of delaying his trial because appellant failed to make his request until jury selection had started. Respondent claims that since appellant's problems with his counsel "were known" to appellant on prior court dates, because he chose to remain silent, appellant should not be entitled to counsel of choice. (RB 12.)

Based on appellant's trial counsel's statements, however, it was not as if appellant waited to ask for new counsel once he assessed that his lawyer was unprepared to represent him at trial. Trial counsel himself admitted that he was retained the day before the preliminary hearing and took a week to get the file. (1 R.T. 95.) Counsel himself said that he and appellant were getting along until "we progressed into trial." (1 R.T. 95.) Voir dire had started only the day before appellant's request to fire his attorney. The record reflects that appellant was still considering taking a possible plea deal as late as January 23, 2007. (1 R.T. 11.) Thus it is in fact unknown when exactly appellant's dissatisfaction with counsel rose to the level of deciding he could not go further with his retained trial counsel and ultimately respondent's suggestion is not the test for when the court can allow a client to discharge his retained attorney.

Respondent cites to the recent case of *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428, wherein Division Four of this Court found the trial court

properly denied the defendant's motion to discharge his attorneys after he had "lost confidence" in them. (RB 14.) In *Keshishian*, the court determined that the case had been pending for two and a half years, after numerous defense requests for continuances had been granted. The prosecution vigorously opposed a further continuance, citing the passage of time since the incident, the age of the case and problems with witnesses. (*Id.* at p. 428.) Here, no such delay had taken place and there were no indicated problems locating witnesses.

The events underlying the charges took place on January 20, 2007. (1 C.T. 60-61.) As noted by respondent, appellant was only arraigned on the case on May 16, 2007, the month prior to his request. On July 18, 2007, his defense counsel announced ready for trial and on July 20, 2007, the case was transferred to Department 116 for jury trial. Voir dire commenced on July 23, 2007. (1 C.T. 79-80, 87, 91, 94-96, RB 7) The prosecution voiced no opposition to a continuance. Unlike *Keshishian*, appellant did not have a history of continuances and was not making demands to delay a trial.

In reality, the record demonstrates that jury selection was barely underway by the time appellant requested to discharge his counsel, as soon as he was brought into court at 11:20 a.m. on July 24, 2007. (1 R.T. 87.) The day prior, July 23, 2007, a panel of forty jurors was brought into the courtroom at 2:15 p.m. The jurors were admonished and voir dire of the first eighteen commenced. (1 C.T.

94.) The panel was excused at 4:05 p.m. (1 R.T. 14, 86.)

Given the infancy of the case against appellant and the lack of any prior continuances, the court should not have assumed, as the court alluded in its comments, that appellant's only purpose for asking to discharge his attorney was for unnecessary delay to avoid going to trial. (1 R.T. 91.) In fact, nothing in the record supported the trial court's hasty conclusion.

ARGUMENT II

AS APPELLANT DEMONSTRATED AT THE MOTION FOR A NEW TRIAL, HE WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL. HIS MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED

A. The Decision Not to Call Monique Lewis To Testify Was Not Tactical

Appellant's motion for new trial was based on a claim of ineffective assistance of trial counsel in violation of his Sixth and Fourteenth Amendment rights. (2 S.C.T. 10.) In the motion, appellant provided a declaration from Monique Lewis, appellant's sister, which stated that she would have testified that she took a gun over to the 5514 Budlong address, after the date of the alleged crimes. The gun Lewis said she took to the Budlong residence was the shotgun used as evidence against appellant. (2 S.C.T. 10.) Lewis said she was never contacted by appellant's trial counsel. (2 S.C.T. 10.)

Respondent asserts that counsel likely refrained from calling Lewis because she could have been impeached for familial bias and counsel has a right to not call witnesses based on trial tactics. (RB 20.) Obviously, trial counsel did not need to contact Lewis to establish that she was family member of appellant. Family bias is an appropriate subject of inquiry and trial counsel could have endeavored on direct examination to neutralize any perceived bias on the part of Lewis. Lewis's declaration indicates that trial counsel never contacted nor interviewed her, thus

his decision not to call her to testify could not have been based on any tactical decision. It well established that no valid tactical decision can be made in the absence of adequate investigation:

> A defendant can reasonably expect...that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a decision, his action - no matter how unobjectionable in the abstract - is professionally deficient. *In re Gay,* (1998) 19 Cal. 4th 771, 807, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The failure to adequately investigate strips the failure to present a witness of any possible tactical justification. In consequence, when counsel fails both adequately to investigate and to present such evidence, the failure satisfies the first prong of the *Strickland* test. *(Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

B. A Possible Second Gun Does Not Diminish The Importance Of The Uncalled Witness Because Appellant Was Not Charged With Use of A Gun Other Than The Shotgun

Respondent says that because appellant is alleged to have pointed a shotgun at one of the victims, Lewis' testimony about the shotgun would not have prevented appellant from being convicted on other counts. (RB 21.) According to the amended information, Counts I, II, III and VI, and the firearms allegations specifically related to the use of a shotgun. (1 C.T. 100-105.) No other handgun is mentioned in the verdict forms completed by the jurors, thus it is not possible to

say that additional explanation about the late appearance of the shotgun would have led the jury to find other counts based on a handgun. (1 C.T. 164-169.) On the contrary, with the testimony of Lewis the jury would have had reason to question more seriously the disputed testimony about the shotgun and petitioner would have been acquitted of, at least, the offenses involving the use of a gun. Since no gun was recovered during the search of the residence the day of the alleged event, if the jurors believed that the only gun recovered had been placed there by Monique Lewis *after* the incident, the jurors would have been left with a suspicious hole in the prosecution's case and appellant would have prevailed.

The court abused its discretion when it denied appellant's motion for new trial based on ineffective assistance of counsel since but for trial counsel's deficient performance, appellant would have been able to raise a reasonable doubt about his use of a gun in the charged crimes.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in his opening brief, appellant's convictions should be reversed and he should be afforded a new trial where his is represented by competent counsel of his own choice.

Dated: December 2, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The text of this brief consists of 2971 words as counted by the Word Perfect version 10 word processing program used to generate this brief.

Dated: December 2, 2008

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